

STATE OF ALASKA (KONIAG, INC.)

IBLA 94-130

Decided December 2, 1996

Appeal from a decision of the Alaska State Office, Bureau of Land Management, terminating public easements issued under section 17(b) of the Alaska Native Claims Settlement Act. AA 6677-A.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Access--Alaska Native Claims Settlement Act: Procedures: Conformance

BLM properly reduced four ANCSA site easements ranging from 10 to 2-1/2 acres in extent to 1 acre each in order to conform them to 43 CFR 2650.4-7(b)(3).

2. Alaska Native Claims Settlement Act: Conveyances: Easements--Alaska Native Claims Settlement Act: Easements: Access--Alaska Native Claims Settlement Act: Procedures: Conformance

After reserving two ANCSA trail easements in an interim conveyance to a Native corporation, BLM properly shortened the easements to avoid crossing individual Native allotments in which no continuation of the trail easements had been reserved, and in order to limit the reservations to lands conveyed to the corporation.

APPEARANCES: John T. Baker, Esq., Anchorage, Alaska, Assistant Attorney General for the State of Alaska; Jacquelyn R. Luke, Esq., Anchorage, Alaska, for Koniag, Inc.; Carlene Faithful, Esq., Anchorage, Alaska, Office of the Regional Solicitor, Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

The State of Alaska has appealed from a November 2, 1993, decision of the Alaska State Office, Bureau of Land Management (BLM), terminating six public easements earlier reserved by Interim Conveyance No. 117 to Koniag, Inc. (Koniag), as successor to the original grantee. The easements at issue were reserved pursuant to section 17(b) of the Alaska Native Claims Settlement Act of 1971 (ANCSA), 43 U.S.C. § 1616(b) (1976). Two of the

terminated easements (EIN 9 and EIN 11) were for portions of trails that were found to cross Native allotments in which no reservation for the trails had been made. The remaining four easements affected by the BLM decision (EIN 13a, EIN 13b, EIN 20, and EIN 21) were site easements originally containing more than 1 acre that were reduced to 1 acre so as to conform them to 43 CFR 2650.4-7(b)(3)(ii).

On appeal to this Board, the State contends the BLM decision did not include required factual findings showing that the easements terminated were unnecessary, and that access guaranteed the State by ANCSA was consequently lost because of the wholly conclusory and erroneous nature of the decision here under review. The State, citing State of Alaska, 78 IBLA 390 (1984), argues that BLM also failed to make necessary findings concerning alternative means of access to State waters at Larsen Bay and on the Karluk River, and further alleges that BLM's decision wrongly failed to enforce a November 12, 1976, agreement between BLM and Koniag made in contemplation of settlement of litigation that ended in the decision of Alaska Public Easement Defense Fund v. Andrus, 435 F. Supp. 664 (D. Alaska 1977) (Defense Fund). It is the position of the State that, under the 1976 agreement, BLM must oblige Koniag to donate easements necessary to insure public access and to protect the access provided by both the trail and site easements at issue in this appeal (Statement of Reasons (SOR) at 6, 7).

Koniag and BLM contend that the State lacks standing to maintain this appeal because navigability of the waters claimed by the State in this case has not been proved and therefore has not been shown to be subject to any claim of property ownership by the State so as to provide a predicate for appeal. Nonetheless, it is assumed, for the purposes of this opinion, that the waters claimed by the State provide a property interest sufficient to confer standing to maintain this ANCSA appeal within the limitation upon such appeals imposed by 43 CFR 4.410(b). See State of Alaska, 78 IBLA at 393. After considering the State's appeal on the merits, however, we conclude that the decision here under review should be affirmed. Questions raised by the State concerning the four site easements are discussed first.

[1] The 1993 BLM decision that reduced the four site easements to 1 acre each explained that a Departmental regulation required such action. The decision stated that it was reducing the extent of EIN 13a from 10 acres, EIN 13b from 2-1/2 acres, EIN 20 from 5 acres, and EIN 21 from 15 acres. The regulation BLM applied, 43 CFR 2650.4-7(b)(3), requires that site easements reserved for transportation shall be "no larger than one acre in size and located on existing sites unless a variance is in either instance, otherwise justified." Id. at (ii). On its face, therefore, the BLM decision simply conformed the reservation of these easements to the Departmental regulation governing their issuance.

As further support for this position, BLM points to a comment letter to BLM from the Alaska Department of Fish and Game dated May 25, 1993, agreeing that 1-acre sites for EIN 13b, EIN 20, and EIN 21 "should be sufficient." See SOR, Exh. C at 2. As to EIN 13a, the same letter

agrees that 10 acres is not needed but suggests that 1 acre is "only marginal" and requests "that a 2 - 3 acre site be retained if at all possible." While this was clearly a request for a variance from the regulation limiting such site easements to 1 acre, no attempt to justify the request was included in the letter, and none appears elsewhere in the record before us. Under the circumstances, BLM reasonably concluded that the 1-acre rule required by regulation should apply to all four sites.

Further support for the view that site easement EIN 13a does not warrant a variance from the regulatory 1-acre limitation appears in a statement by Koniag's manager of lands and resources, reciting that:

The State has objected to the reduction in the size of site easement 13a on the grounds it receives heavy use. In fact, however, the lands described in IC 117 as easements 13a and 13b receive little, if any, actual use by the general public. As described in IC 117, the 13a site probably encompasses an existing small cabin inherited from the Navy and subsequently FWS [U.S. Fish and Wildlife Service], which Koniag has rented out for many years. It also encompasses the mouth of a small side stream which forms a small, somewhat V shaped steep valley. Upstream about 200 meters or so, at the large old Navy/FWS/Koniag cabin, the pace of the river quickens markedly from slackwater and flows over numerous large boulders, precluding float plane access. Thus, because of the steep terrain and the inability of float planes to travel so far downstream, virtually all of EIN 13a is poorly suited for a site easement, and, consequently, is seldom used by anyone except cabin renters and people fishing from the bank.

(Koniag Answer, Exh. F, at 4).

As we stated in State of Alaska, supra, the burden to show there was an error made by BLM in an easement case rests with the appellant. Here, that means the State must show the BLM decision is in error as to each of the questioned easement terminations or modifications. See id., 78 IBLA at 397. The State has made no such showing, but has instead insisted that BLM should demonstrate that each easement termination is not incorrect (SOR at 9, 11), or, alternatively, that this matter should be remanded to provide a more complete statement of intended overall effect considering other easement questions not considered by the 1993 BLM decision now under review. See Reply at 10. On the record before us, however, the four site easement terminations have not been shown by the State to have been reduced in error. On the contrary, each partial site termination is supported by the record and has been shown to be in conformity to the Departmental regulation governing the allowable area of such site easements; the BLM decision concerning EIN 13a, EIN 13b, EIN 20, and EIN 21 must therefore be affirmed. Id.

[2] The principal argument now advanced by the State on appeal seems to be mainly directed to the two trail easements, EIN 9 and EIN 11. See

Reply at 6-9. The State contends that BLM neither "offered any justification for \* \* \* the decision to terminate the easements" (SOR at 8), nor sufficiently defined a foundation for the action taken, indulging instead in "piece-meal decision-making" (Reply at 10). In each trail easement terminated by the November 1993 decision, however, BLM explained that the easements crossed an individual Native allotment for which a certificate had been issued. Because there has been no reservation of an easement across either allotment for the EIN 9 and EIN 11 trails, in order to conform the Koniag conveyance to reflect the presence of these conflicting conveyances, the Koniag easements were changed to avoid the individual Native allotments. This change was accomplished by shortening portions of both easements running along the shoreline inside the allotment; these changes did not affect access to the uplands from the Bay, which is the sole matter of concern to the State. We find the BLM decision concerning these two easements was sufficiently narrow and definite so as to exactly inform the State (and Koniag) of the precise nature of the action taken by BLM and requires no further elaboration, since public access is unaffected by the change.

In the case of EIN 9, the 1993 BLM decision stopped the trail easement at land conveyed by Native allotment certificate 50-78-0075; the BLM decision terminated only that part of the trail easement that followed the shoreline of Larsen Bay inside the Native allotment, parallel to the bay shoreline. In an earlier comment directed to this change during planning, the State observed that

[i]f access from the site easement at the head of Larsen Bay to the south can be achieved below the mean high tide line (public land), then the trail can be started at the southeast corner of the allotment and continue on as previously designated. If the shoreline does not provide reasonable access, an upland easement may be required.

See SOR, Exh. C at 1. While this comment suggests that the State questioned whether the shortening of EIN 9 might not affect access to the uplands, it does not show that the change in the easement to avoid the Native allotment had curtailed effective access from the water to the upland, nor does it establish that BLM erred when the final decision on this easement was made to shorten the easement by avoiding the individual allotment.

Similarly, in the case of EIN 11, the 1993 BLM decision ended the trail reserved across Koniag land where it met land conveyed by allotment certificate 50-85-0652 (also on the shore of Larsen Bay). In so doing, BLM found that this change afforded continued public access to the uplands from the coastline. In the case of EIN 11 also, the State had earlier commented, acknowledging that "[i]t may be possible to access public lands to the north of Larsen Bay by creating a branch off the Karluk Portage trail" (SOR, Exh. C at 2). As was true of the comment concerning EIN 9, this observation does not challenge the change proposed, but expresses a possible reservation concerning whether the remaining access will be sufficient. On the record before us, therefore, it does not appear that the

State lacked notice of the effect that changes made by the BLM decision in EIN 11 would have, nor does it appear that access to the upland from Larsen Bay was blocked when the EIN 11 trail was shortened to avoid an individual Native allotment. The BLM decision explains exactly what is done and for what reason in the case of both EIN 9 and EIN 11: the trails are shortened to avoid two Native allotments; a way of public entry from the Bay to the upland is not eliminated thereby.

Nonetheless, the State argues that it is entitled to additional easements under ANCSA and should be granted alternative easements by donation from Koniag for this purpose (SOR at 9; Reply at 11). In support of this insistence upon entitlement to additional reservations of public access from land granted to Koniag, the State urges that BLM has failed to enforce the 1976 agreement between Koniag and BLM by providing for donation by Koniag of a class of easements designed to replace easements similar to those invalidated by the Defense Fund decision, cited above (SOR at 8; Reply at 6). The State contends that it was a party to the Defense Fund case, and is therefore entitled to benefit from the 1976 agreement between Koniag and BLM. In support of this argument, the State points to exhibit B to the State's SOR: it is a September 3, 1993, internal memorandum from a BLM Assistant District Manager that discusses the easements in Interim Conveyance No. 117 and suggests that donations from Koniag should be sought in reliance on the 1976 agreement. Exhibit B, however, was not issued as a final appealable decision by BLM and deals with matters outside the decision here under review. Nonetheless, the State makes this document the principal focus of the request for relief made on appeal.

The BLM decision now before us is silent concerning matters discussed by exhibit B; nothing in it suggests that exhibit B (which states that BLM and Koniag are negotiating concerning easement donations) is relevant to this appeal. The contentions raised by the State in reliance on exhibit B assume (in addition to the inference that an appeal may be based upon the possibilities revealed by exhibit B) that the easements now under review are similar to the indefinitely described "floating easements" that were found invalid in the Defense Fund opinion at 435 F. Supp. 680. See SOR at 4, 8; Reply at 6, 7. Yet nothing in the record before us indicates that EIN 9 and EIN 11 were not definitely described. On the contrary, it appears that they were. Moreover, it is not apparent that either easement was considered in relation to a donation by Koniag, or that any of the other easements dealt with by the 1993 BLM decision were so affected. Consequently, the question whether Koniag was obliged to make such easement donations does not form any part of the decision before us on appeal.

An appeal to this Board must be taken from a decision, as that term is defined in 43 CFR 4.410; a decision is some action by BLM affecting persons having interests in the public lands. See Joe Trow, 119 IBLA 388, 392 (1991). Since no action was taken by the decision here under review respecting easements donated under the 1976 agreement, no issue concerning such matters is presented for our review by the decision. Id. The arguments sought to be raised by the State concerning the effect, if any, of the 1976 agreement or applicability of the Defense Fund decision are

not, therefore, properly made in the context of this appeal and must be rejected. One who appeals a BLM easement decision must show error in order to prevail; such a decision will be reversed only if it is shown not to be supported by the record and if it lacks a rational basis. State of Alaska, 78 IBLA at 397. No such showing has been made in this case as to any of the six easements at issue. The four site easements, EIN 13a, EIN 13b, EIN 20, and EIN 21, all of which originally exceeded 1 acre in extent, were properly reduced to 1 acre to conform to 43 CFR 2650.4-7(B)(3)(ii). Portions of trail easements EIN 9 and EIN 11 were properly terminated in order to limit the trail reservations to land conveyed to Koniag. The BLM decision to modify the six Koniag easements here at issue has, therefore, been shown to have a rational foundation in fact and to be supported by the record.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Franklin D. Amess  
Administrative Judge

I concur.

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James L. Bymes  
Chief Administrative Judge

